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Checkpoint Systems, Inc., and
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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

GLOBAL TRIM SALES, INC., a
California corporation,

Plaintiff,

v.

CHECKPOINT SYSTEMS (UK) LTD., a
United Kingdom limited company;
CHECKPOINT SYSTEMS, INC., a
Pennsylvania corporation; and
BRILLIANT LABEL MFG. LTD., a
Hong Kong limited company,

Defendants.

Case No. SACV 12-01314 - JLS (RNBx)

**DEFENDANTS' *EX PARTE*
APPLICATION FOR AN ORDER
TO AMEND CASE MANAGEMENT
ORDER TO MOVE THE TRIAL
DATE AND PERMIT HEARING
SUMMARY JUDGMENT MOTIONS
ON COURT'S FIRST OPEN
HEARING DATE;**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Hon. Josephine L. Staton

EX PARTE APPLICATION

Defendants Checkpoint Systems UK Ltd, Checkpoint Systems, Inc., and Brilliant Label Manufacturing Ltd. (collectively “Checkpoint”) respectfully request an order amending the Scheduling Order (1) to allow Checkpoint to notice its motions for summary judgment to be heard on August 8, 2014 (which is three weeks after the current deadline to hear motions in the current Scheduling Order) or to be heard on another date convenient for the Court, (2) to move the final pretrial conference and trial dates (currently set for August 15 and 26, respectively) by a corresponding three weeks (or by a corresponding extension if the hearings are set later than August 8), and (3) reversing its order (Doc. 90) striking Checkpoint’s motion for summary judgment on its counterclaim against Global Trim Sales, Inc. (“GTS”), which motion was filed on May 30, 2014 and is noticed for hearing on August 8, 2014.

Good cause exists for such an order, for the following reasons:

1. Under the current Scheduling Order, the deadline to file motions has not yet passed, and Checkpoint can and will file its motions well in advance of the deadline. (That is, the current deadline is June 20, 2014, *i.e.*, 28 days before the July 18, 2014 deadline for hearings on law and motion matters.).

2. Checkpoint should not be deprived of its right under the Federal Rules of Civil Procedure to file a summary judgment motion for the reason that the Court’s calendar is impacted. Although Checkpoint believes strongly that its motions for summary judgment will eliminate (or, at a minimum, significantly narrow) the issues to be tried in this case, Checkpoint cannot notice its motions to be heard on the current hearing deadline of July 18, 2014, because that date is closed on the Court’s calendar and has been for some time (Checkpoint understands that date has been closed since, or very shortly after, the parties received the Court’s ruling on GTS’s motion to reopen fact and expert discovery and continue all current deadlines, as discussed below).

3. It would have been impractical, as well as improper, for Checkpoint to have filed its summary judgment motions while GTS’s motion to reopen fact and expert

1 discovery and continue all current deadlines was pending, for the reasons explained in
2 the accompanying Memorandum of Points and Authorities.

3 Specifically, the facts are as follows: in light of the Court's admonition that
4 parties should, if possible, provide more than the minimum 28-days' notice of a motion
5 for summary judgment, Checkpoint was diligently preparing both a motion for
6 summary judgment on the claims against it by plaintiff GTS, and a motion for summary
7 judgment on its counterclaims against GTS. Checkpoint was planning to file the
8 motions in about April 2014, following receipt of GTS's expert reports in March 2014,
9 and well in advance of the July 18, 2014 deadline for hearings on motions.

10 However, on March 28, 2014, GTS filed a Motion to Reopen Fact Discovery and
11 Extend Certain Case Management Dates. Docs. 63 & 67. GTS noticed its motion to
12 be heard on May 16, 2014. *Id.* In its motion to re-open discovery, GTS argued that it
13 had not had the opportunity to discover information necessary to prosecute its claims.
14 *See* Doc. 63-1 at 1, 8-11, and *passim*. Further, although GTS did not file with its motion
15 an affidavit specifically referencing Federal Rule of Civil Procedure 56(f), GTS's counsel
16 filed a declaration stating that GTS needed to conduct additional discovery, and that
17 GTS believed it had not yet had the opportunity to discover all facts necessary to
18 support its claims. *See* Doc. 63-2 at ¶¶ 2, 40-41, 43, 45 and 48. While Checkpoint
19 disputed GTS's assertions, GTS's motion thus raised with the Court significant
20 questions as to whether GTS had sufficient opportunity to develop facts upon which it
21 would need to rely to oppose any motion for summary judgment from Checkpoint.

22 In light of GTS's motion, Checkpoint did not know whether fact discovery
23 would be reopened, whether previously completed depositions would be reconvened or
24 whether new depositions of additional witnesses would be conducted. In addition,
25 Checkpoint did not know whether GTS would be permitted to serve new expert
26 reports, potentially setting forth new and different opinions, and potentially relying
27 upon new and different facts, in place of those it had served on March 10, 2014. This
28 was not a hypothetical concern: the opinions of GTS's damages expert, Richard Squar,

1 had changed fairly significantly between his first report dated August 30, 2013 and his
 2 revised report dated March 10, 2014 (and then changed again, albeit less significantly, in
 3 yet another report GTS served on April 8, 2014). ***Because both of Checkpoint's***
 4 ***motions cite to, and rely on, the most recent report of Mr. Squar,*** as well as on the
 5 facts adduced during discovery – all of which potentially could change (in the case of
 6 expert opinions) or be supplemented (in the case of the facts) if GTS's then-pending
 7 motion was granted – Checkpoint could not reliably finalize or file its motions for
 8 summary judgment until the Court ruled on GTS's motion.

9 On May 14, 2014, the Court denied GTS's motion. Doc. 78. Checkpoint
 10 accordingly prepared, and sent to GTS within a few days, a detailed, five-page meet and
 11 confer letter addressing the substance of Checkpoint's anticipated summary judgment
 12 motions, as required by Local Rule 7-3. On Friday, May 23, 2014, GTS responded to
 13 Checkpoint's letter, disagreeing with all of Checkpoint's arguments and declining to
 14 stipulate to dismissal or entry of judgment as to any of its claims or as to Checkpoint's
 15 counterclaim. Accordingly, on that same day, counsel for Checkpoint checked the
 16 Court's motion calendar, but discovered that all available hearing dates through July 18,
 17 2014 were closed. Checkpoint called the Court's clerk, but was told that it could not
 18 notice its motions for a closed hearing date without the Court's permission; the clerk
 19 suggested that Checkpoint notice its motion for the first available hearing date, but
 20 Checkpoint was concerned about doing so without at least requesting permission from
 21 the Court first.

22 Immediately after speaking with the clerk, on Friday afternoon, May 23, 2014,
 23 counsel for Checkpoint called counsel for GTS to see if the parties could stipulate to
 24 the relief requested. On Wednesday, May 28, following the Memorial Day holiday
 25 weekend, counsel for GTS responded and the parties were able to agree upon a briefing
 26 schedule for summary judgment motions. The parties prepared and filed a stipulation
 27 and proposed order that same day, which was designed to alleviate the difficulties
 28 caused by the Court's busy calendar. Docs. 79 & 79-1.

1 On Friday, May 30, 2014, Checkpoint filed a motion for summary judgment on
 2 its counterclaims against GTS and requested, pursuant to the May 28 stipulation, a
 3 hearing date of August 8, 2014, which was the first available date on the Court's
 4 calendar. Docs. 81-88. On Tuesday, June 3, 2014, the Court denied the parties'
 5 stipulation and request for an Order setting a briefing schedule, and rejected
 6 Checkpoint's motion for summary judgment as "untimely." Docs. 89 & 90.

7 Given these circumstances, Checkpoint respectfully submits that it should not be
 8 deprived of the opportunity to file summary judgment motions and have the issues that
 9 are now ripe for adjudication by the Court addressed before trial. Checkpoint very
 10 strongly believes that both of its motions for summary judgment have merit and will
 11 serve to significantly narrow – if not eliminate entirely – the issues to be tried in this
 12 case. Because, however, the next available hearing date is after the current case
 13 management deadline for hearings on motions, and because the Court has denied the
 14 parties' requested stipulation to amend the schedule (in part because it would necessitate
 15 a corresponding extension of the trial date, which the parties did not request),
 16 Checkpoint brings the instant *ex parte* application, respectfully requesting an Order (1)
 17 amending the case management schedule (pursuant to the parties' stipulation) to allow a
 18 hearing on Checkpoint's motions for summary judgment on August 8, 2014 or
 19 whatever date is convenient for the Court, (2) continuing the final pretrial conference
 20 and trial dates (currently August 15, 2014 and August 26, 2014, respectively) by a
 21 corresponding number of weeks (3 if the hearing is on August 8; more if the hearing is
 22 later), and (3) reversing its order (Doc. 90) striking Checkpoint's motion for summary
 23 judgment on its counterclaim against GTS, which motion was filed on May 30, 2014
 24 and is noticed for hearing on August 8, 2014 .

25 Checkpoint is prepared to file its motions in time to provide GTS **more** than the
 26 minimum amount of time to oppose the motions, and **more** that the time stipulated to
 27 by the parties to oppose the motions. GTS thus will in no way be prejudiced by the
 28 relief requested in (1) and (3) above. With respect to the relief requested in (2), above, a

1 brief (few week) continuance of the pretrial conference and trial dates will not prejudice
 2 GTS inasmuch as it just requested a four-month continuance of both dates in its recent
 3 motion, asking to move both to December 2014.¹

4 In contrast, if this motion is denied, Checkpoint – which is still within the
 5 deadline to file motions under the current Scheduling Order (if the Court’s calendar were
 6 not so severely impacted) – would be significantly and unfairly prejudiced, in that it will
 7 be denied all opportunity to have its motions for summary judgment heard and
 8 addressed before proceeding to trial. Such result will also impose a burden on the Court,
 9 inasmuch as Checkpoint very strongly believes its motions have merit, and will eliminate
 10 or, at a minimum, significantly narrow the issues to be tried.

11
 12 Dated: June 4, 2014

TATRO TEKOSKY SADWICK LLP

13
 14 By: /s/ Steven R. Tekosky

15 Steven R. Tekosky, Esq.

16 Attorneys for Defendants
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24 ¹ Immediately upon receipt of the Court’s June 3 order denying entry of the
 25 proposed order on the parties’ stipulation, counsel for Checkpoint contacted GTS to
 26 see whether it would stipulate to the additional relief requested herein, *i.e.*, a brief (few
 27 week) continuance of the pretrial conference and trial dates. Although GTS had just
 28 filed a motion requesting a **several month** continuance of both dates, GTS responded
 the next day (*i.e.*, today) that it will not agree to Checkpoint’s requested continuance of
 the trial date, and that it will oppose this *ex parte* application

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

Pursuant to the case management schedule entered by the Court, the fact discovery cut-off was February 24, 2014, initial expert reports were due on March 10, 2014, and the last day to hear summary judgment motions is July 18, 2014. Doc. 52. With the close of fact discovery, Checkpoint determined that facts had not been established that would excuse GTS from paying for the goods GTS ordered, nor had facts been developed that would impose on Checkpoint liability for any of GTS's claims against it. Checkpoint therefore began preparing summary judgment motions, which it expected could be filed in or about early April, after it received the final transcripts of the depositions taken in this case, and after GTS prepared and served its expert witness reports, including the report from GTS's damages expert setting forth the scope of and bases for the damages GTS is seeking from Checkpoint in this action. Declaration of Paul B. Foust in Support of Defendants' Ex Parte Application ("Foust Decl."), ¶ 2.² On March 10, 2014, GTS served its "updated" expert reports, including a report by its damages expert, Richard Squar, which was significantly different from the previous report disclosed by GTS. *Id.* ¶ 3. This new report offered brand new damages theories and relied upon facts not previously disclosed. *Id.*

As Checkpoint was preparing its motions, on March 28, 2014, GTS filed a Motion to Reopen Fact Discovery and Extend Certain Case Management Dates, setting the hearing date for May 16, 2014. Docs. 63 & 67. Accompanying this motion, GTS submitted a declaration by its counsel, George Hampton, declaring, under penalty of

² GTS's damages expert's report is relevant not just to Checkpoint's motion for summary judgment on GTS's claims against Checkpoint, but also is relevant to Checkpoint's counterclaim against GTS, which seeks damages for products that GTS ordered and accepted from Checkpoint but refused to pay for. GTS's damages expert sets forth in his report the value of the portion of those product that GTS was unable to sell to its customers, which value is relevant to the issues in Checkpoint's motion for summary judgment on its counterclaims against GTS. Foust Decl. ¶ 4.

perjury, among other things, that GTS had not had the opportunity to conduct discovery on several areas that might support GTS's claims. *See* Doc. 63-2 at ¶¶ 2, 40-41, 43, 45 and 48. Likewise, GTS argued that it had not had the opportunity to discover information necessary to prosecute its claims and that the opinions of its damages expert, Richard Squar, might change yet again. *See* Doc. 63-1 at 1, 8-11, and *passim*. While Checkpoint disputed GTS's or its counsel's view about the opportunity to take discovery, Checkpoint believed that Mr. Hampton's declaration was, in sum and substance, equivalent to an affidavit pursuant to Federal Rule of Civil Procedure 56(d).³

On April 8, 2014, GTS served yet another expert disclosure, offering a third report by Mr. Squar which yet again altered Mr. Squar's damages opinion. Foust Decl. ¶ 5. This third expert disclosure stated that GTS "has not completed its investigation of all the facts relating to this case. Because fact-discovery is not yet complete, plaintiff anticipates that newly-discovered facts may come to light that are material to the above-identified experts' opinions. Should that occur, plaintiff will ask Mesrs. Squar and Romeo to provide supplemental reports addressing such newly-discovered facts." *Id.* ¶ 6.

Checkpoint, accordingly, did not know whether fact discovery would be reopened, whether previously-completed depositions would be reconvened, whether new depositions of additional witnesses would be conducted, whether such depositions – including depositions of third party witnesses in foreign jurisdictions – would reveal new facts, or whether GTS would be permitted to serve new expert reports in place of those it served on August 30, 2013, March 10, 2014 and April 8, 2014. Foust Decl. ¶ 7. Further, GTS's position regarding discovery was clear. GTS appeared to believe sincerely – albeit incorrectly – that it could develop additional facts to support its claims,

³ This Rule provides as follows: "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."

1 and submitted a declaration to this effect to the Court, under penalty of perjury. Under
 2 these circumstances, Checkpoint believed that filing its motions for summary judgment
 3 might lead to a multiplication of proceedings that, while not ill intentioned or
 4 improperly motivated, might nevertheless violate the spirit, and possibly the letter, of
 5 the Civility and Professionalism Guidelines adopted by this Court. Checkpoint thus
 6 believed it impractical, if not inappropriate, to file its motions for summary judgment
 7 when the evidence on which its motion relied might not be complete and might change
 8 significantly (in the case of GTS's damages expert), when the entire case management
 9 schedule might be extended by almost six months, as GTS requested, and when GTS
 10 already had submitted a declaration substantially similar to what would and could be
 11 filed pursuant to Rule 56(d). *Id.* ¶ 9.

12 On May 14, 2014, the Court denied GTS's motion. Doc. 78. Checkpoint
 13 accordingly prepared, and sent to GTS within a few days thereafter, a detailed, five-page
 14 meet and confer letter addressing the substance of Checkpoint's anticipated summary
 15 judgment motions, as required by Local Rule 7-3. Foust Decl. ¶ 10. On Friday, May
 16 23, 2014, GTS responded to Checkpoint's letter, disagreeing with all of Checkpoint's
 17 arguments and declining to stipulate to dismissal or entry of judgment as to any of its
 18 claims or as to Checkpoint's counterclaim. *Id.* ¶ 11. Accordingly, on that same day,
 19 counsel for Checkpoint checked the Court's motion calendar, but discovered that all
 20 available hearing dates through July 18, 2014 were closed. *Id.* ¶ 12. Checkpoint called
 21 the Court's clerk, but was told that it could not notice its motions for a closed hearing
 22 date without the Court's permission; the clerk suggested that Checkpoint notice its
 23 motion for the first available hearing date, but Checkpoint was concerned about doing
 24 so without at least requesting permission from the Court first. *Id.* ¶ 13.

25 Immediately after speaking with the clerk, on Friday afternoon, May 23, 2014,
 26 counsel for Checkpoint called counsel for GTS to see if the parties could stipulate to
 27 the relief requested. Foust Decl. ¶ 14. On Wednesday, May 28, following the Memorial
 28 Day holiday weekend, counsel for GTS responded and the parties agreed on a briefing

1 schedule for summary judgment motions. *Id.* ¶ 15. The parties prepared and filed a
 2 stipulation and proposed order that same day which was designed to alleviate the
 3 difficulties caused by the Court's busy calendar. Docs. 79 & 79-1.

4 On Friday, May 30, 2014, Checkpoint filed a motion for summary judgment on
 5 its counterclaims and requested, pursuant to the May 28 stipulation, a hearing date of
 6 August 8, 2014, which was the first available date on the Court's calendar. Docs. 81-88.
 7 On Tuesday, June 3, 2014, the court denied the parties' stipulation and request for an
 8 order setting a briefing schedule, and rejected Checkpoint's motion for summary
 9 judgment as "untimely." Docs. 89 & 90.

10 **II. ARGUMENT**

11 **A. Checkpoint's Motions for Summary Judgment are Not Untimely**

12 Under the Central District of California's Civil Local Rules, a motion is
 13 considered timely if filed no later than twenty-eight days prior to the hearing date. *See*
 14 Local Rule 6-1; *see also* Initial Standing Order at p.10 ("Whenever possible, the party
 15 moving for summary judgment should provide more than the minimum twenty-eight
 16 (28) day notice for motions."). The current scheduling order provides that "[t]he last day
 17 for law and motion hearings shall be continued from November 22, 2013 (which is the
 18 current deadline to file motions, other than motions *in limine*), to July 18, 2014 (the
 19 deadline for *hearings* on motions, other than motions *in limine*).” Doc. 52. Thus
 20 Checkpoint understood that a motion for summary judgment would be timely if filed
 21 and served by June 20, 2014.

22 The Court's calendar, however, is impacted, and no hearing dates are available for
 23 upwards of two to three months. Checkpoint understands that this is due to matters
 24 outside of Checkpoint's knowledge or control, such as, potentially, the number of
 25 matters before the Court, the complexity of those matters, the funding for Courts, the
 26 nomination and approval of judges to the Central District, and various other matters that
 27 might play a role in creating a busier-than-usual load on one particular Court.
 28 Checkpoint further respectfully suggests that Checkpoint should not be deprived of its

1 important right to have motions for summary judgment heard before trial as a result of
2 matters beyond Checkpoint's control.

3 A summary judgment motion is an important procedural right. Rule 56 of the
4 Federal Rules of Civil Procedure provides that "[a] party may move for summary
5 judgment, identifying each claim or defense — or the part of each claim or defense —
6 on which summary judgment is sought. The court shall grant summary judgment if the
7 movant shows that there is no genuine dispute as to any material fact and the movant is
8 entitled to judgment as a matter of law." Fed. R. Civ. Proc., Rule 56. The Federal Rules
9 thus provide that where there is no genuine dispute as to any material fact, the parties
10 have the *right* to make a motion for summary judgment. *See, e.g., Kennedy v. City of*
11 *Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986) (Where a complaint is sufficient to withstand
12 a motion to dismiss, but the facts are not born out during discovery, "the defendant still
13 retains the right to file a motion for summary judgment so that the further harassment of
14 going to trial may be avoided."); *see generally INVST Fin. Grp., Inc. v. Chem-Nuclear Sys.,*
15 *Inc.*, 815 F.2d 391, 403 (6th Cir. 1987) (addressing "the right to file a motion for
16 summary judgment"). District courts may promulgate their own local rules so long as
17 those rules comport with the Federal Rules of Civil Procedure. Fed.R.Civ.P. 83(a)(1);
18 *Heinemann v. Satterberg*, 731 F.3d 914, 916 (9th Cir. 2013). Checkpoint respectfully
19 suggests that an interpretation of the Court's chamber rules which operates to deprive a
20 party of its right to a summary judgment motion simply because the party could not
21 accurately predict the future to know precisely when the Court's calendar would fill up
22 would be inconsistent with the Federal Rules, and thus invalid. Fed.R.Civ.P. 83(a)(1).
23 Therefore Checkpoint urges an interpretation of this Court's chamber rules which is
24 consistent with the Federal Rules establishment of summary judgment as a right of the
25 parties. *See Heinemann*, 731 F.3d at 916.

26 **B. Checkpoint Could Not Have Filed its Motions Earlier**

27 Through no fault of its own, Checkpoint finds itself in a conundrum. While
28 Checkpoint was in the process of preparing to file its motions for summary judgment

1 after the fact discovery cutoff and submission of GTS's expert reports in March 2014,
 2 GTS filed a motion to re-open discovery and extend all case management dates, which
 3 motion was set for hearing on May 16, 2014. Docs. 63 & 67. Prior to the ruling on this
 4 motion, it was infeasible for Checkpoint to file dispositive motions because fact
 5 discovery and depositions might be re-opened, witnesses about whom Checkpoint has
 6 little, if any, knowledge might testify to new facts about which Checkpoint could not
 7 even speculate, and new expert reports might be submitted once again substantially
 8 changing the damages theories of GTS on its claims, or the evidence in support of such
 9 theories and opinions. Without knowing what the factual record would look like at the
 10 time the motions were heard, Checkpoint could not state to the Court with any integrity
 11 which facts were disputed and which facts were undisputed. Further, any attempt to list
 12 all facts as undisputed, when, in fact, such facts might be disputed after additional
 13 discovery took place, if such discovery had been granted, would seem to be a violation of
 14 Checkpoint's ethical responsibilities, as well as a breach of this Court's local rules
 15 regarding preparation of separate statements of undisputed facts and conclusions of law.

16 **C. Checkpoint Reasonably Believed That, Even if it Could Have Filed**
 17 **its Motions Before the Court Ruled on GTS's Motion to Reopen**
 18 **Discovery, Doing So Would Have Led to a Multiplication of**
 19 **Proceedings, and Potentially Violated the Court's Civility and**
 20 **Professionalism Guidelines**

21 Under Fed.R.Civ.P. 56(f), a trial court must order a continuance on a motion for
 22 summary judgment if the party requesting a continuance submits affidavits showing that,
 23 without a continuance for additional discovery, it cannot present facts necessary to
 24 justify its claims or defend against another party's claims (or counterclaims). *See*
 25 Fed.R.Civ.P. 56(f). "Although Rule 56(f) facially gives judges the discretion to disallow
 26 discovery when the non-moving party cannot yet submit evidence supporting its
 27 opposition, the Supreme Court has restated the rule as requiring, rather than merely
 28 permitting, discovery 'where the nonmoving party has not had the opportunity to
 discover information that is essential to its opposition.'" *Metabolife Int'l, Inc. v. Wornick*,

264 F.3d 832, 846 (9th Cir. 2001); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (Summary judgment must “be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.”); *Metabolife Int’l*, 264 F.3d at 846 (“Rule 56 does not limit discovery. On the contrary, it ensures that adequate discovery will occur before summary judgment is considered.”).

Here, GTS’s motion to re-open discovery argued precisely that GTS had not had the opportunity to discover information necessary to prosecute GTS’s claims. *See* Doc. 63-1 at 1, 8-11, and *passim*. Although GTS did not file with its motion to reopen discovery and continue the case management days by several months an affidavit specifically referencing Rule 56(f), GTS’s counsel ***had*** filed a declaration stating GTS’s perceived need to conduct additional discovery and its belief that it had not yet had the opportunity to discover all facts necessary to support its claims. *See* Doc. 63-2 at ¶¶ 2, 40-41, 43, 45 and 48. While Checkpoint did not (and does not) agree with GTS’s assertion that additional discovery would be necessary to address the issues to be raised in Checkpoint’s motions, the issue was already before the Court with an declaration substantially similar to what would be contained in a request under Rule 56(f) and Checkpoint did not (and does not) believe that filing a summary judgment motion under such circumstances would have comported with either the spirit or the letter of the Civility and Professionalism Guidelines for this Court.

D. Good Cause Exists to Amend the Scheduling Order to Allow Checkpoint’s Motions to be Heard and to, if Necessary, Move the Trial Date as Appropriate

Good cause exists to amend the Scheduling Order to allow Checkpoint to file its summary judgment motions and set them for hearing on August 8, 2014, or any other date thereafter convenient for the Court. Once a Rule 16 scheduling order is filed, the “schedule may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). “Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking the amendment.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992); *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). If the

1 party seeking to modify was not diligent in its pretrial preparations, the inquiry should
 2 end there and the relief sought should not be granted. *Zivkovic*, 302 F.3d at 1087; *Johnson*,
 3 975 F.2d at 609. *See also Plascencia v. Lending 1st Mortgage*, 2012 WL 253319 at *5-6 (N.D.
 4 Cal. 2012) (“A party moving for an amendment to a scheduling order must... show that
 5 the scheduling order imposes deadlines that have become unworkable notwithstanding
 6 its diligent efforts to comply with the schedule, and that it was diligent in seeking the
 7 amendment once it became apparent that extensions were necessary”).

8 Good cause exists here because Checkpoint has been diligent in seeking relief to
 9 modify the schedule by just a few weeks to allow its motions to be heard on the Court’s
 10 first available open hearing date. Within days of the Court’s ruling on GTS’s motion to
 11 re-open discovery, Checkpoint initiated a meet-and-confer with GTS regarding
 12 Checkpoint’s contemplated summary judgment motions. The same day that GTS
 13 responded to Checkpoint’s meet and confer efforts and declined Checkpoint’s invitation
 14 to stipulate to judgment or voluntary dismissal of the issues raised in Checkpoint’s meet-
 15 and-confer letter, counsel for Checkpoint checked the Court’s motion calendar and
 16 contacted the clerk regarding scheduling a hearing date on Checkpoint’s summary
 17 judgment motions.

18 Good cause further exists because the deadlines imposed by the Scheduling
 19 Order have become unworkable due to no fault of Checkpoint, but instead due to the
 20 confluence of two factors out of Checkpoint’s control: the uncertainty resulting from
 21 GTS’s motion to re-open discovery and the Court’s busy motion calendar. Checkpoint
 22 understands that the only way it could have secured a hearing date on or before the July
 23 18, 2014 deadline in the current Scheduling Order would have been if it filed its
 24 summary judgment motions while GTS’s motion to re-open completed depositions, take
 25 new depositions, and submit new expert reports, was still pending – which, as addressed
 26 above, Checkpoint had no reason to believe was necessary, would not have been
 27 possible, and even if possible, would have been unprofessional and discourteous in light
 28 of the sworn declaration of GTS’s counsel, George Hampton, regarding his perceived

1 need for additional discovery to prove GTS's claims, and thereby to oppose
 2 Checkpoint's motion for summary judgment. Respectfully, to deny the relief requested
 3 herein (a very brief, few week extension of the remaining deadlines) on the ground that
 4 Checkpoint purportedly should have filed its motions earlier, while GTS's motion to re-
 5 open discovery and continue all case management deadlines was pending, would be
 6 exceedingly inequitable to Checkpoint.

7 Good cause further exists in light of the significance of the motions at issue.
 8 Checkpoint has very strong motions for summary judgment (or partial summary
 9 judgment) that it believes will *eliminate*, or at least *significantly narrow*, the issues to
 10 be tried in this case. Foust Decl. ¶ 16. Checkpoint should not be precluded from
 11 bringing those motions based on the unfortunate confluence of GTS's pending motion
 12 and the Court's heavy motion schedule.

13 **E. A Brief Continuance of the Hearing Deadline, Pretrial Conference**
 14 **and Trial Date will Not Prejudice Either Party, While a Denial of**
 15 **this Motion Will Impose Significant Prejudice on Checkpoint**

16 If this motion is denied, Checkpoint – which is still within the deadline to file
 17 motions under the current Scheduling Order (if the Court's calendar were not so severely
 18 impacted) – would be significantly and unfairly prejudiced, in that it will be denied all
 19 opportunity to have its motions for summary judgment heard and addressed before
 20 proceeding to trial. Such result will also impose a burden on the Court, inasmuch as
 21 Checkpoint very strongly believes its motions have merit, and will eliminate or, at a
 22 minimum, significantly narrow the issues to be tried.

23 Alternatively, if this motion is granted, no prejudice will result. With respect to
 24 the summary judgment motions, GTS has already stipulated to a briefing scheduling
 25 permitting Checkpoint until June 13, 2014 to file its motions, with GTS's oppositions
 26 due on July 11, 2014. Checkpoint already filed and served one of its motions on May 30,
 27 2014, well in advance of both the parties' stipulated filing deadline and the deadline to
 28 file motions pursuant to the case management order. Checkpoint is prepared to file its
 other motion this week – again, in advance of both deadlines. GTS thus will not be

1 prejudiced by an Order permitting the motions to be heard on August 8, 2014. And
 2 GTS unquestionably will not be prejudiced by an Order scheduling the hearing on the
 3 motions for a date later than August 8, 2014, since GTS would have even more time
 4 than it stipulated for to prepare its oppositions.

5 GTS similarly will not be prejudiced by an Order continuing the August 15, 2014
 6 final pretrial conference or the August 26, 2014 trial date by three weeks (if the summary
 7 judgment hearing is August 8) or by a few additional weeks (if the hearing is later),
 8 inasmuch as GTS just filed a motion requesting that these same dates be continued by
 9 several months. That is, GTS requested that the pretrial conference be continued to
 10 December 5, 2014, and that the trial be continued to December 16, 2014. Doc. 63-1 at
 11 2. A continuance far shorter than GTS requested thus will impose no prejudice on it.

12 **III. CONCLUSION**

13 For the forgoing reasons, Checkpoint respectfully requests that this Court grant
 14 its application and issue an Order (1) to allow Checkpoint to notice its motions for
 15 summary judgment to be heard on August 8, 2014 (or other date convenient for the
 16 Court), (2) to move the final pretrial conference and trial dates (currently set for August
 17 15 and 26, respectively) by a corresponding three weeks (or by a corresponding
 18 extension if the hearings are set later than August 8), and (3) reversing its order (Doc.
 19 90) striking Checkpoint's motion for summary judgment on its counterclaim against
 20 GTS, which motion was filed on May 30, 2014 and is noticed for hearing on August 8,
 21 2014.

22 Dated: June 4, 2014

TATRO TEKOSKY SADWICK LLP

23 By: /s/ Steven R. Tekosky

24 Steven R. Tekosky, Esq.

25 Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 4th of June, 2014, I electronically filed

**DEFENDANTS' *EX PARTE* APPLICATION FOR AN ORDER TO AMEND
CASE MANAGEMENT ORDER TO MOVE THE TRIAL DATE AND
PERMIT HEARING SUMMARY JUDGMENT MOTIONS ON COURT'S
FIRST OPEN HEARING DATE; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

**with the Clerk of the court using the CM/ECF system, which will send a notification
of such filing (NEF) to the following:**

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And

BY FACSIMILE

 x

The within document(s) was/were served on the interested party(ies) in said action via
facsimile transmission from the following fax number (213) 225-7151.

/s/ Karen L. Roberts
Karen L. Roberts